

# **EXHIBIT “C”**



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## **SPECIAL REPORT: States Mull Suit Against Drug Companies**

*By Mary Guiden, Staff Writer, Stateline.org*

In an action modeled on their 1998 class action lawsuit against the tobacco industry, at least six states are poised to go to court to try to force pharmaceutical companies to lower prescription prices, law enforcement and health care officials tell Stateline.org.

"The goal is nothing less than changing the way the industry does business," says Mark Schlein, director of Florida's Medicaid Fraud Control Unit in the Attorney General's office.

Attorneys general in Florida, Georgia, Maine, Massachusetts, Nevada and Texas are among those considering legal action, officials from some of the offices said. Nevada's Tim Terry, director of the state's Medicaid Fraud Control Unit, says while he's "not at liberty to comment" on specifics, he expects "other developments [on this matter] in the next couple of months."

A state health official familiar with discussions about state action said there's a strong consensus across the country. "I really get the sense there's a lot of energy, mostly from attorney generals' offices. As soon as there's any kind of endorsement from the Health Care Financing Administration (HCFA), all 50 states are going to jump on it," said the official, who spoke on condition of anonymity.

HCFA, the federal agency that oversees Medicaid and Medicare, requires drug manufacturers to report their lowest drug prices, or "best price." "We've asked for their assistance to determine whether or not pharmaceutical manufacturers violated agreements with HCFA to provide states with the best price on drugs," says Martin Smith, spokesperson for Georgia's Department of Community Health.

A HCFA spokesperson declined comment on any potential problems.

State attorneys general aren't waiting for HCFA's permission to seek information from the drug companies. Bristol-Meyers Squibb says it and other manufacturers have responded to subpoenas from Massachusetts and several other states.

"We have cooperated fully with the subpoenas, and we're not aware we're the subject of any investigation. Bristol-Meyers is not the only company being investigated in an attorney general's office. We're confident that our practices are fully compliant with state and federal laws," says spokesperson Patrick Donahue.

The potential for litigation grows out of a three year-old Justice Department investigation of the Bayer Corporation that in January resulted in Bayer settling with the states and the federal government for \$14 million.

In a Jan. 23 news release announcing the settlement, the Justice Department said the government's investigation "revealed that the pharmaceutical company beginning in the early 1990s falsely inflated the reported drug prices referred to by the industry as the Average Wholesale Price."

The AWP is the average price that wholesalers give to retailers for a given medication. Medicare and Medicaid programs use the AWP in calculating reimbursements to pharmacists and doctors.

"By setting an extremely high AWP and, subsequently, selling the product to doctors at a dramatic discount, Bayer induced physicians to purchase its products rather than those of competitors by enabling doctors to profit from reimbursement paid to them by the government," the Justice Department said. As part of the agreement, Bayer said it would "provide the state and federal governments with the average selling prices of its drugs ... and potentially prices for its competitors' products," the Justice Department said.

Meantime, Texas Attorney General John Cornyn brought a lawsuit against three drug companies seeking \$79 million for alleged Medicaid fraud. The firms are Dey, Inc., Roxane Laboratories, Inc. and Warrick Pharmaceuticals Corp.

In court documents filed by the state in Travis County District Court on Sept. 7, the suit says that the firms "knowingly and intentionally made false representations of prices and costs for certain of their inhalation drugs directly and indirectly to the Texas Medicaid program."

The state also says the "Medicaid program relied on the false and deceptive inflated prices and costs reported by the [pharmaceutical companies] and thus was defrauded into paying amounts that substantially exceeded a true and correct price for the drugs in question." Justice Department spokesperson Jill Stillman and Barbara Zelner, a spokesperson for the National Association of Medicaid Fraud Control Units, refused to comment on inquiries into other manufacturers, citing an "ongoing investigation." The Pharmaceutical Research and Manufacturers of America (PhRMA)-- which drug companies defer to--also refused comment, citing the "ongoing" nature of the case.

A catalyst for state legal action is Florida businessman Zachary Bentley, who is going from state to state urging state attorneys general to sue drug manufacturers. It was Bentley who triggered the Bayer case. He says he alerted federal authorities years ago about "the corrupting influence" of pharmaceutical manufacturers after his healthcare company was "put out of business" by a competitor. Under whistleblower and federal False Claims laws, Bentley gets a portion of any settlement that results from what he's revealed.

Through his company, which delivered intravenous drugs for diseases like AIDS to a patient's home, Bentley says he discovered discrepancies between the published Average Wholesale Price (AWP) of prescription drugs and what the drug companies actually charged retailers for the same drugs. "Medicaid and Medicare reimburse certain drugs at ten times the cost. Providers, as a result, make a huge windfall profit," Bentley says.

Because of Bentley's efforts, the Justice Department last May released to states a list of 479 drugs that the department said had inflated AWPs. A partial copy of the list obtained by Stateline.org shows that:

- Adriamycin, an antibiotic used in cancer treatment and manufactured by Pharmacia, had an AWP of \$241.36 as of April 2000. DOJ said the real wholesale price was \$33.43.
- Amikacin, used to treat an infection that HIV+ people get and manufactured by Abbott, had an AWP of \$54.56. DOJ said the actual best price was \$6.75.
- Toposar, also manufactured by Pharmacia, is used to treat testicular and lung cancer. Its AWP as of April 2000 was \$28.38; DOJ found that retailers were buying it for \$1.70.
- Vancomycin, an antibiotic used to treat intestinal infections and manufactured by Abbott, had an AWP of \$68.77 as of April 2000. DOJ adjusted it to \$8.14.

Bentley says that the AWP "is only part of" the price inflation controversy. "There's a whole area of questionable conduct and questionable areas manufacturers have used," he says.

Congressman Pete Stark (D-CA) wrote letters to PhRMA President Alan Holmer last fall and to Pharmacia Upjohn, Bristol-Meyers Squibb and Abbott on Feb. 27, alleging among other things, "the exploitation of America's seniors and disabled who are forced to pay inflated drug costs."

In a five-page letter to Bristol-Meyers Squibb president Peter Dolan, Stark alleges there is "compelling evidence that Bristol-Meyers Squibb ('Bristol') for many years deliberately overstated the prices of some of its prescription drugs in order to cause the Medicare and Medicaid programs to pay inflated amounts to Bristol's customers."

Stark's letter also contains a chart that details an alleged spread between the AWP and actual price to Florida oncologists for the drug Blenoxane. In 1995, the AWP was \$276.29 but oncologists were charged \$224.22, for a spread of \$52.07. In 1998, the AWP was listed at \$304.60; the price charged to doctors was \$140 for a spread of \$164.60.

Florida's Schlein says abuse is widespread. "The whole area of prescription drug fraud is incredibly important and involves virtually every manufacturer. It involves nothing less than a conspiracy among manufacturers, middlemen and doctors who prescribe [the drugs]. The bottom line is everyone is doing this with a nod and a wink and [taxpayers] are paying for it," he says.

Other state officials have voiced similar concerns. Georgia Department of Community Health director Russ Toal said at a Medicaid forum in February that his state has reason to believe that pharmaceutical manufacturers are overcharging Medicaid programs. "We've sent some evidence of that to both the Health Care Financing Administration and the Department of Justice, and I hope that other states are doing the same," he said.

Former Maine Attorney General Andrew Kettner says "the area [of AWP] is fertile for attorneys general to look into. Pharmaceutical companies spend a fair amount of money on research and development for wells that don't have oil and they have to recover from those losses in some way. [A lawsuit] is not out of the range of possibilities that would come on to the radar screen. It's an area that is of great interest to a lot of people."

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum of the Attorney General of the Commonwealth of Pennsylvania in Opposition to Class Certification was served on all counsel of record by electronic service pursuant to Case Management Order No. 2.

Dated: February 8, 2005

Respectfully submitted,



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